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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B5

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: AUG 2 0 2010

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you.

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, on September 9, 2008. The petitioner filed a motion to reopen/reconsider on October 14, 2008 that the director granted. On October 29, 2008, the director discussed the two educational equivalency reports found in the record, and then dismissed the motion. The matter is now before the Administrative Appeals Office (AAO) on appeal.[1] The appeal will be dismissed.

The petitioner is an information technology consulting and solutions company. It seeks to employ the beneficiary permanently in the United States as a senior RDBMS web developer pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, a Form ETA 750,[2] Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the beneficiary did not satisfy the minimum level of education stated on the labor certification. Specifically, the director determined that the beneficiary did not possess a four-year bachelor's degree and that the beneficiary's educational credentials were not in the any of the fields listed on the certified ETA Form 750. The director dismissed the petitioner's motion accordingly.

The record shows that the appeal is filed properly,[3] timely, and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's September 9, 2008 denial, the issue in this case is whether or not the petitioner established the beneficiary has the requisite academic credentials for the proffered position.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal. On appeal, the petitioner resubmits evidence submitted on motion. The petitioner also requests that the petition be considered under the EB3 Skilled Worker/Professional classification, if not found approvable under the advanced degree professional EB2 classification.

The AAO views the petitioner's request to change classification as a material change to the petitioner. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176. (Assoc. Comm. 1988). To change visa preference classifications for I-140 petitions, the petitioner must file a new I-140 petition with the corresponding fees and documentation. The AAO will not consider any EB-3 professional or skilled worker classification in these proceedings.

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[1] The petitioner is appealing the director's decision of the previous motion to reconsider.

[2] After March 28, 2005, the correct form to apply for labor certification is the Form ETA 9089.

[3] With the initial petition, the petitioner submitted a G-28 dated June 18, 2007 that is signed by the beneficiary. The record contains a second G-28 dated August 10, 2009, also signed by the beneficiary. There is no G-28 in the record of proceedings signed by the petitioner, although the attorney identified on the G-28 is elsewhere identified as the petitioner's general counsel. The AAO views the petition as self-represented.

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

The beneficiary possesses a foreign three-year bachelor of science degree in English, chemistry, botany and zoology, awarded by the Faculty of Science, Andhra University. The record contains the beneficiary's Bachelor of Science diploma and six Statements of Marks for the various examinations taken during the three year program. The beneficiary also possesses a master's degree in Human Resource Management from Andhra University. The record contains the beneficiary's diploma for his master's program dated April 1995 and two Statements of Marks dated July 1994 and April 1995, respectively. He also possesses a post graduate diploma in systems management from Nehru Yuva Kendra, an institution affiliated with the Human Resources Development Youth Affairs and Sport in collaboration with CAT Information and Communication PVT ltd.

Thus, the issue is whether that the beneficiary's three-year degree is a foreign degree equivalent to a U.S. baccalaureate degree or whether the beneficiary's combined degrees are the equivalent of a bachelor's degree or master's degree in Engineering, CIS, Computer Science, Mathematics, Science and Business. We must also consider whether the beneficiary meets the job requirements of the proffered job as set forth on the labor certification.

Eligibility for the Classification Sought

As noted above, the ETA 750 in this matter is certified by DOL. DOL's role is limited to determining whether there are sufficient workers who are able, willing, qualified and available and whether the employment of the alien will adversely affect the wages and working conditions of workers in the United States similarly employed. Section 212(a)(5)(A)(i) of the Act; 20 C.F.R. § 656.1(a).

It is significant that none of the above inquiries assigned to DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether or not the alien is qualified for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by federal circuit courts. *See Tongatapu Woodcraft Hawaii, Ltd. v. Feldman,* 736 F. 2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

On appeal, the petitioner relies on a letter from Mr. [redacted] Director of the Business and Trade Services Branch of U.S. Citizenship and Immigration Services' (USCIS) Office of Adjudications. The letter discusses whether a "foreign equivalent degree" must be in the form of a single degree or whether the beneficiary may satisfy the requirement with multiple degrees. The Office of Adjudications letter is not binding on the AAO. Letters written by the Office of

Adjudications do not constitute official USCIS policy and will not be considered as such in the adjudication of petitions or applications. Although the letter may be useful as an aid in interpreting the law, such letters are not binding on any USCIS officer as they merely indicate the writer's analysis of an issue. *See* Memorandum from [redacted] Acting Associate Commissioner, Office of Programs, *Significance of Letters Drafted by the Office of Adjudications* (Dec. 7, 2000) (copy incorporated into the record of proceeding).

Rather, the AAO is bound by the Act, agency regulations, precedent decisions of the agency and published decisions from the circuit court of appeals from whatever circuit that the action arose. *See N.L.R.B. v. Askkenazy Property Management Corp.* 817 F. 2d 74, 75 (9th Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS,* 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd* 273 F.3d 874 (9th Cir. 2001) (unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private publications or widely circulated

A United States baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Reg'l. Comm'r. 1977). This decision involved a petition filed under 8 U.S.C. §1153(a)(3) as amended in 1976. At that time, this section provided:

> Visas shall next be made available . . . to qualified immigrants who are members of the professions . . . .

The Act added section 203(b)(2)(A) of the Act, 8 U.S.C. §1153(b)(2)(A), which provides:

> Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent . . . .

Significantly, the statutory language used prior to *Matter of Shah*, 17 I&N Dec. at 244 is identical to the statutory language used subsequent to that decision but for the requirement that the immigrant hold an advanced degree or its equivalent. The Joint Explanatory Statement of the Committee of Conference, published as part of the House of Representatives Conference Report on the Act, provides that "[in] considering equivalency in category 2 advanced degrees, it is anticipated that the alien must have a bachelor's degree with at least five years progressive experience in the professions." H.R. Conf. Rep. No. 955, 101st Cong., 2nd Sess. 1990, 1990 U.S.C.C.A.N. 6784, 1990 WL 201613 at 6786 (Oct. 26, 1990).

At the time of enactment of section 203(b)(2) of the Act in 1990, it had been almost thirteen years since *Matter of Shah* was issued. Congress is presumed to have intended a four-year degree when it stated that an alien "must have a bachelor's degree" when considering equivalency for second preference immigrant visas. We must assume that Congress was aware of the agency's previous treatment of a "bachelor's degree" under the Act when the new classification was enacted and did not intend to alter the agency's interpretation of that term. *See Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978) (Congress is presumed to be aware of administrative and judicial interpretations where it

adopts a new law incorporating sections of a prior law). *See also* 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (an alien must have at least a bachelor's degree).

In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the Immigration and Naturalization Service (the Service), responded to criticism that the regulation required an alien to have a bachelor's degree as a minimum and that the regulation did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990), and the Joint Explanatory Statement of the Committee of Conference, the Service specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor's degree:

> The Act states that, in order to qualify under the second classification, alien members of the professions must hold "advanced degrees or their equivalent." As the legislative history . . . indicates, the equivalent of an advanced degree is "a bachelor's degree with at least five years progressive experience in the professions." Because neither the Act nor its legislative history indicates that bachelor's or advanced degrees must be United States degrees, the Service will recognize foreign equivalent degrees. But both the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor's degree.*

56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (emphasis added).

There is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(2) of the Act as a member of the professions holding an advanced degree with anything less than a full baccalaureate degree. More specifically, a three-year bachelor's degree will not be considered to be the "foreign equivalent degree" to a United States baccalaureate degree. *Matter of Shah*, 17 I&N Dec. at 245. Where the analysis of the beneficiary's credentials relies on work experience alone or a combination of multiple lesser degrees, the result is the "equivalent" of a bachelor's degree rather than a "foreign equivalent degree."[4] In order to have experience and education equating to an advanced degree under section 203(b)(2) of the Act, the beneficiary must have a single degree that is the "foreign equivalent degree" to a United States baccalaureate degree. 8 C.F.R. § 204.5(k)(2). As explained in the preamble to the final rule, persons who claim to qualify for an immigrant visa by virtue of education or experience equating to a bachelor's degree may qualify for a visa pursuant to section 203(b)(3)(A)(i) of the Act as a skilled worker with more than two years of training and experience. 56 Fed. Reg. at 60900.

For this classification, advanced degree professional, the regulation at 8 C.F.R. § 204.5(k)(3)(i)(B) requires the submission of an "official academic record showing that the alien has a United States

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2 *Compare* 8 C.F.R. § 214.2(h)(4)(iii)(D)(*5*) (defining for purposes of a nonimmigrant visa classification, the "equivalence to completion of a college degree" as including, in certain cases, a specific combination of education and experience). The regulations pertaining to the immigrant classification sought in this matter do not contain similar language.

baccalaureate degree or a foreign equivalent degree." For classification as a member of the professions, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) requires the submission of "an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study." We cannot conclude that the evidence required to demonstrate that an alien is an advanced degree professional is any less than the evidence required to show that the alien is a professional. To do so would undermine the congressionally mandated classification scheme by allowing a lesser evidentiary standard for the more restrictive visa classification. Moreover, the commentary accompanying the proposed advanced degree professional regulation specifically states that a "baccalaureate means a bachelor's degree received *from a college or university*, or an equivalent degree." (Emphasis added.) 56 Fed. Reg. 30703, 30306 (July 5, 1991). *Compare* 8 C.F.R. § 204.5(k)(3)(ii)(A) (relating to aliens of exceptional ability requiring the submission of "an official academic record showing that the alien has a degree, *diploma, certificate or similar award* from a college, university, *school or other institution of learning* relating to the area of exceptional ability"). In determining whether the [???] diploma from [???] is a foreign equivalent degree, we have reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officer (AACRAO). ACCRAO, according to its website, www.aacrao.org, is "a nonprofit, voluntary, professional association of more than 10,000 higher education admissions and registration professionals who represent approximately 2,500 institutions in more than 30 countries." Its mission "is to provide professional development, guidelines and voluntary standards to be used by higher education officials regarding the best practices in records management, admissions, enrollment management, administrative information technology and student services." According to the registration page listed on their website, EDGE is "a web-based resource for the evaluation of foreign educational credentials."

EDGE provides a great deal of information about the educational system in India, and while it confirms that a bachelor of science degree is awarded upon completion of two or three years of tertiary study beyond the Higher Secondary Certificate (or equivalent) and represents attainment of a level of education comparable to two to three years of university study in the United States, it does not suggest that a three-year degree from India may be deemed a foreign equivalent degree to a U.S. baccalaureate.

EDGE also discusses both Post Secondary Diplomas, for which the entrance requirement is completion of secondary education, and Post Graduate Diplomas, for which the entrance requirement is completion of a two- or three-year baccalaureate. EDGE provides that a Post Secondary Diploma is comparable to one year of university study in the United States but does not suggest that, if combined with a three-year degree, may be deemed a foreign equivalent degree to a U.S. baccalaureate. EDGE further asserts that a Postgraduate Diploma following a three-year bachelor's degree "represents attainment of a level of education comparable to a bachelor's degree in the United States." The "Advice to Author Notes," however, provides:

> Postgraduate Diplomas should be issued by an accredited university or institution approved by the All-India Council for Technical Education (AICTE). Some students complete PGDs over two years on a part-time basis. When examining the Postgraduate Diploma, note the entrance requirement and be careful not to confuse

> the PGD awarded after the Higher Secondary Certificate with the PGD awarded after the three-year bachelor's degree.

With regard to the beneficiary's postgraduate diploma from Nehru Yuva Kendra, the record contains no evidence that this entity is a college or university, or that the program is accredited by AICTE.

With regard to the beneficiary's combined three-year bachelor of science diploma and his two-year Master's degree in Human Resources Management, EDGE notes that the Master of Arts/Commerce Science in India represents the attainment of a level of education comparable to a bachelor's degree in the United States. (The EDGE materials are enclosed with this decision.) The AAO notes that the EDGE materials do not specify that the additional studies undertaken for a master's degree should be in the same field of study as the prior three years of post secondary education, in order to be considered the equivalent of a U.S. bachelor's degree.

Nevertheless, based on the beneficiary's initial three year bachelor of science degree and his master's degree in Human Resources Management, EDGE would find that the beneficiary has the equivalent of a U.S. bachelor's degree. Thus, the beneficiary does have a "United States baccalaureate degree or a foreign equivalent degree," and does qualify for preference visa classification under section 203(b)(2) of the Act as he does have the minimum level of education required for the equivalent of an advanced degree.

Qualifications for the Job Offered

Relying in part on *Madany*, 696 F.2d at 1008, the U.S. Federal Court of Appeals for the Ninth Circuit (Ninth Circuit) stated:

> [I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from DOL that stated the following:

> The labor certification made by the Secretary of Labor ... pursuant to section 212(a)[(5)] of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the*

> *certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating: "The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer." *Tongatapu,* 736 F. 2d at 1309.

The key to determining the job qualifications is found on Form ETA-750 Part A. This section of the application for alien labor certification, "Offer of Employment," describes the terms and conditions of the job offered. It is important that the ETA-750 be read as a whole. The instructions for the Form ETA 750A, item 14, provide:

> ***Minimum Education, Training, and Experience Required to Perform the Job Duties.*** Do not duplicate the time requirements. For example, time required in training should not also be listed in education or experience. Indicate whether months or years are required. Do not include restrictive requirements which are not actual business necessities for performance on the job and which would limit consideration of otherwise qualified U.S. workers.

Moreover, when determining whether a beneficiary is eligible for a preference immigrant visa, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1015. USCIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *Id.* The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to examine the certified job offer *exactly* as it is completed by the prospective employer. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve reading and applying *the plain language* of the alien employment certification application form. *See id.* at 834. USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

Regarding the minimum level of education and experience required for the proffered position in this matter, Part A of the labor certification reflects the following requirements:

> Block 14:
>
> Education: Master's
>
> Major Field of Study: Engineering, CIS, Comp Sci, Math, Sci, Bus

Experience: Two Years in the proffered position or two years in the related occupation of Programmer Analyst/Programmer/Swr Engineer/ Jr. Executive/ or related.

Block 15: *(14 Cont.) Bachelor's & 5 years of progressively responsible experience will substitute for Master's and 2 yrs experience.

(1) At least 1 yr experience in developing Visual Basic applications
(2) At least 2 yrs experience in developing Oracle PL/SQL programs

The AAO notes that the position as described on the ETA-750 meets the requirements for an EB2 visa preference classification, and the beneficiary does have a "United States baccalaureate degree or a foreign equivalent degree," and, thus, does qualify for preference visa classification under section 203(b)(2) of the Act. However, the beneficiary does not meet the job requirements on the labor certification. As the director correctly noted in his denial of the petitioner's motion, the beneficiary's Master's degree in Human Resource Management from Andhra University is not in any of the fields stipulated on the ETA Form 750. The AAO notes that while the beneficiary's Master's degree is considered a single degree, it is not in any of the specified fields of study.[5] Thus, the petitioner has not established that the beneficiary is qualified to perform the proffered position.

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[5] On motion, the petitioner submitted a second educational evaluation report on motion from Dr. [redacted] who describes the beneficiary's three-year baccalaureate degree in chemistry, zoology and botany, and his two year Master's of Arts degree in Human Resource Management as the equivalent of a baccalaureate degree in Business Administration. The AAO notes that the field of business administration is not clearly included on the ETA Form 750, and the beneficiary's transcripts do not reflect any undergraduate coursework in business administration. His master's degree coursework reflect considerable coursework in labor management and industrial relations. Dr. [redacted]'s evaluation is also in conflict with the initial educational evaluation report submitted by the Trustforte Corporation dated September 13, 2004. In this report Mr. [redacted] stated that the beneficiary's three-year baccalaureate program was equivalent to three years of study at an accredited U.S. institution and that his master's level studies were the equivalent of a U.S. bachelor's degree in Human Resource Management. Mr. [redacted] then looked at the beneficiary's studies at Nehru Yuva Kendra to establish that the beneficiary had the equivalent of a U.S. bachelor's degree in computer science. As previously discussed, the record does not establish that Nehru Yuva Kendra is an accredited university or college in India. Thus the two educational evaluation reports are in conflict. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states: "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." The AAO would give only limited weight to these evaluations.

The Petitioner's Ability to Pay the Proffered Wage

Beyond the decision of the director, the AAO notes that the petitioner has not established its ability to pay the proffered wage of $70,000 as of the September 12, 2003 priority date. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750, Application for Alien Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on September 12, 2003. The proffered wage as stated on the Form ETA 750 is $70,000 per year. In the petitioner's audited report for tax year 2006, the auditors stated that in 2006 the petitioner elected to be structured as an S Corporation. The record contains no further information as to the petitioner's business structure in tax years 2003 to 2005. Further, the petitioner submitted its financial statement covering March to December 2006 with an independent auditors' report prepared by [redacted] New Brunswick, New Jersey.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation as of 2006. On the petition, the petitioner claimed to have been established in 1996 and to currently employ 800 workers. The petitioner claims a gross annual income of $71,000,000. The AAO notes

that in a cover letter dated November 7, 2007, [redacted] the petitioner's CFO, notes that in fiscal year 2004, the petitioner's revenues exceeded $38,000,000; in for 2005, the petitioner's revenues were $56,000,000 and for calendar year 2006, its revenues is $71,000,000.

Mr. [redacted] also states that the petitioner's quarterly Tax Return (Form 941) for 2005 shows that the petitioner employed 554 employees and paid wages of $8,328,423.24; and that at the end of 2006 it employed 763 employees paying wages of $13,204,374.49. With regard to the second quarter Form 941 for 2007, Mr. [redacted] states that the petitioner is employing 837 employees with wages to date of $14,383.961. Mr. [redacted] asserts that the petitioner's net current assets for 2005, 2006 and 2007 (as of May 2007) were $4.7 million, $6.8 million and $8.1 million, respectively. Mr. [redacted] states that this level of financial success clearly indicates the petitioner's ability to pay the wages of all its employees, including the beneficiary.

The AAO notes that the petitioner submits no evidence, such as federal tax returns for the relevant period of time, to further substantiate these assertions. The Form 941, referenced by Mr. [redacted] is not found in the record. The petitioner's general counsel repeats similar financial figures in a cover letter that accompanies the I-140 petition. However, the assertions of the petitioner or of counsel, do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The only evidence submitted to the record to date, the audited 2006 financial report, while indicating consultant salaries of $31,560.709, shows the petitioner's net income as $2,707,627.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner submitted two pay stubs from 2007 that indicates the petitioner paid the beneficiary an hourly wage of $33.659 with year-to-date wages of $55,625 as of September 21, 2007. The petitioner also submitted the beneficiary's W-2 Form for tax years 2005 and 2006 that indicated the petitioner paid the beneficiary $61,078.68 in 2005 and $66,461.63 in 2006. Thus the petitioner has not established that it employed and paid the beneficiary the full proffered wage of $70,000 during any relevant

timeframe including the period from the priority date in 2003 or subsequently. Therefore the petitioner would have to establish its ability to pay the entire proffered wage in tax years 2003 to 2005, and the difference between actual wages and the proffered wage in tax year 2006 and 2007.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income.

With respect to depreciation, the court in *River Street Donuts* noted:

> The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.
>
> We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 116. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added).

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[6] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

The only evidence submitted to the record with regard to the petitioner's ability to pay the proffered wage is its audited financial statement for nine months up to December 2006, with stated net income of $2,743,843. Although the petitioner states that its gross income in other relevant tax years has been significant, these assertions on their own are not sufficient to establish the petitioner's ability to either pay the difference between the beneficiary's actual wages and the proffered wage or the entire proffered wage. Based on the lack of further evidence described at 8 C.F.R. § 204.5(g)(2), the AAO cannot further examine the petitioner's net income or net current assets. Thus, the petitioner cannot establish its ability to pay the proffered wage as of the 2003 priority date or subsequently.

The AAO also notes that the petitioner has filed multiple petitions. USCIS computer records indicate that the petitioner had filed some 3,681 petitions, predominantly I-129 H-1B petitions as of July 2010. In 2010 alone, the petitioner had filed 203 petitions, while during tax year 2009, the petitioner filed some 353 petitions. The petitioner would need to demonstrate its ability to pay the proffered wage for each I-140 beneficiary from the priority date until the beneficiary obtains permanent residence. *See* 8 C.F.R. § 204.5(g)(2). Further, the petitioner would be obligated to pay each H-1B petition beneficiary the prevailing wage in accordance with DOL regulations, and the labor condition application certified with each H-1B petition. *See* 20 C.F.R. § 655.715.

For example, with regard to the 353 new petitions filed in 2009, if all I-129 or I-140 beneficiaries were paid wages similar to those proffered to the beneficiary, the petitioner would require an additional $21,180,000 in new income to pay for these new employees. With regard to the additional new 203 petitions filed from January to July 2010, the petitioner would require an additional $14,210,000 in new revenue to pay wages similar to the $70,000 salary offered to the beneficiary.[7]

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[6] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

[7] This sum represents approximately 203 new petitions filed in 2010 multiplied by the proffered

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612 (BIA 1967). The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner has significant gross revenue based on the audited financial statements during tax year 2006. However, the record is devoid of any other evidence as to the petitioner's ability to pay the proffered wage in any other year during the period of time from 2003 to the present. Beyond the petitioner's 2006 audited financial statement and the assertions of counsel and the petitioner's officer with regard to the petitioner's earlier gross profits, the record contains no further evidence or information on any other aspect of the petitioner's financial viability. The record contains no further discussion or information on issues such as officer compensation, longevity of business, and/or the petitioner's reputation within the IT business community. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage as of 2003 and onward.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, or that it can establish its ability to pay the wages of its multiple beneficiaries.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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wage of $70,000.

ORDER: The appeal of the director's denial of the petitioner's motion to reopen/reconsider is dismissed.